

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

KENNETH A. BURGESS, *et uxor*,

Plaintiffs,

v.

KENDRICK S. BURGESS, *et al.*,

Defendants.

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Case No. 05-6138-CV-SJ REL
Buchanan Co. Case No. 05BUCV04407

NOTICE OF REMOVAL

TO: THE CLERK, U.S. DISTRICT COURT, WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION.

PLEASE TAKE NOTICE that defendant Kendrick S. Burgess, by and through his undersigned counsel, and pursuant to Sections 1332, 1441 and 1446 of Title 28 of the United States Code, hereby removes this action presently pending in the Circuit Court of Buchanan County, State of Missouri, to the United States District Court for the Western District of Missouri, Western Division. As grounds for this removal, defendant states as follows:

Nature of the Action

1. Plaintiffs Kenneth A. Burgess and Sherrie Burgess (“plaintiffs”) commenced this action on September 30, 2005, by the filing of a verified petition in the Circuit Court of Buchanan County, Missouri, under Case No. 05BU-CV04407. A copy of the petition is attached hereto as Exhibit “A”.

2. Plaintiffs bring a purported shareholder’s derivative action against Kendrick S. Burgess and seek declaratory and injunctive relief

3. The action concerns Kendrick Burgess’ ownership interest in Midwest Scrap Management, Inc. and his position as an officer and director.

4. Midwest Scrap Management, Inc. (“Midwest Scrap”) is named merely as a nominal defendant because the shareholder’s derivative action pertains to the ownership of Midwest Scrap and actions taken by purported board members against defendant Kendrick Burgess, an officer and the only individual holding a director position in Midwest Scrap. The Verified Petition contains no allegations against Midwest Scrap. Further, plaintiffs’ attorney has identified Midwest Scrap as a “nominal defendant” in plaintiffs’ Motion to Strike Entry of Appearance of the Gilliford Law Firm as Counsel for Midwest Scrap (Exhibit “D”).

5. Plaintiffs are citizens of the state of Kansas.

6. Defendant Kendrick Burgess is a citizen of the state of Missouri.

7. The amount in controversy exceeds the sum or value of \$75,000.00, exclusive of interests and costs, within the meaning of 28 U.S.C. § 1332(a). Although plaintiffs due not allege an amount in damages, the relief plaintiffs seek is a declaration that actions plaintiffs took at two Board of Directors meetings were proper and that a restraining order be entered prohibiting defendant Kendrick Burgess from entering the property of Midwest Scrap.

8. If the relief plaintiffs seek is granted, defendant will lose his two-third’s interest in a corporation that plaintiffs value in excess of \$2 million. Additionally, plaintiffs seek return of a corporate lock box that defendant Kendrick Burgess allegedly took from Midwest Scrap offices, which allegedly contains \$200,000 in cash. *See* Exhibits A and D.

9. Accordingly, this Court has original jurisdiction over this action. By and through this Notice of Removal, defendant invokes this Court’s jurisdiction under 28 U.S.C. § 1332(a) and removes this action to this Court.

10. On November 22, 2005, defendant Kendrick Burgess filed a Complaint in the United States District Court for the Western District of Missouri against Kenneth and Sherrie Burgess, the plaintiffs herein, alleging, *inter alia* violations of the Racketeer Influenced and Corrupt

Organizations Act (“RICO”), 18 U.S.C. § 1961 *et seq.* in connection with the operation of Midwest Scrap.

Timeliness of this Notice

11. Defendant Kendrick Burgess did not receive, through service or otherwise, a copy of plaintiffs’ Verified Petition until October 24, 2005. On that day, plaintiffs’ attorney, Anthony Durone, handed defendant Kendrick Burgess a copy of the Verified Petition. This case is being removed within thirty days of that date and less than one year after filing of the action in Missouri state court. Thus, this Notice of Removal is timely filed under 28 U.S.C. § 1446(b).

Parties

12. Plaintiffs Kenneth and Sherrie Burgess are now, and at the time the Verified Petition was filed, and at the time the actions were taken that form the basis of the lawsuit, citizens of the state of Kansas.

13. Defendant Kendrick Burgess is now and at all relevant times a citizen of the state of Missouri.

14. Nominal defendant Midwest Scrap Management, Inc. is incorporated in the state of Missouri and its principal place of business is in the state of Missouri.

Jurisdiction

Complete Diversity of Citizenship Exists Between Plaintiffs and the Defendant

15. As stated above, Midwest Scrap is named in Plaintiffs’ Verified Petition merely as a nominal defendant and thus, does not destroy diversity. There are no allegations against Midwest Scrap; the corporation is named merely because plaintiffs have purported to assert a shareholder’s derivative claim, which under Missouri law requires the naming of the corporation.

Jurisdictional Amount

16. Although plaintiffs do not seek monetary damages, they do seek relief, which if granted, would cause defendant Kendrick Burgess to lose the 1,000 shares of stock issued to him in 1996, for which he paid \$25,000.00. This represented two-thirds of the issued shares of stock in Midwest Scrap.

17. As defendant's verified counterclaim alleges, defendant Kendrick Burgess attempted to purchase Kenneth Burgess' 250 shares of stock on September 25, 2005. At that time, Kenneth Burgess valued his 250 shares at \$2 million. Exhibit B, ¶¶ 14, 24.

18. Thus, the amount in controversy exceeds \$75,000.00.

Removal Procedures

19. Because the parties in interest are diverse in citizenship, and the amount in controversy exceeds \$75,000.00, removal is appropriate under 28 U.S.S. § 1441(b). This Notice of Removal is being timely filed.

20. Because this district and division embraces the place where the action is pending, removal to this Court is appropriate under 28 U.S.C. §§ 1441(a) and 1446(a).

21. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being filed with the clerk of the Circuit Court of Buchanan County, Missouri. Also pursuant to 28 U.S.C. § 1446(d), written notice of removal is being served on plaintiffs.

22. Pursuant to 28 U.S.C. § 1446(a), true and correct copies of all process, pleadings, and orders on file with the State Circuit Court in this case are attached hereto as Exhibits A, B, C, D and E.

WHEREFORE, defendant Kendrick Burgess hereby moves this action, now pending in the Circuit Court of Buchanan County, Missouri, to this Court, pursuant to 28 U.S.C. § 1441(b), and respectfully requests that this Court take cognizance, accept jurisdiction, and enter such

orders or take such steps as may be necessary to effect a true record of such proceedings as may have been had in the Circuit Court of Buchanan County, state of Missouri.

Respectfully submitted,

SHAFFER LOMBARDO SHURIN

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CERTIFICATE OF SERVICE

On this 23rd day of November 2005, the above signed hereby certifies that a true and correct copy of the above and foregoing NOTICE OF REMOVAL was filed electronically with the Clerk of the Court using the CM/ECF system, which also sent notification of such filing to counsel of record, in addition to true and correct copies being placed in the United States Mail to:

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